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TANAH AINA SDN BHD lwn. PENTADBIR TANAH, PEJABAT DAERAH & TANAH RAUB & YANG LAIN

MAHKAMAH TINGGI MALAYA, TEMERLOH
ROSLAN MAT NOR PK
[SEMAKAN KEHAKIMAN NO: CB-25-1-06-2022]
B 8 FEBRUARI 2023

Abstrak – *Apabila tamat tempoh kebenaran yang diberi untuk lesen pendudukan sementara tanah, pemohon tidak mempunyai hak automatik untuk diberi lesen tersebut. Jika pemohon membangkitkan harapan sah agar lesen diberi, harus ditunjukkan bahawa terdapat pernyataan yang dibuat oleh pihak berkuasa yang memberi harapan padanya untuk bergantung pada pernyataan tersebut agar satu-satu tindakan, yang diharapkan, akan dilakukan oleh pihak berkuasa tersebut.*

UNDANG-UNDANG PENTADBIRAN: *Semakan kehakiman – Permohonan – Semakan kehakiman terhadap keputusan pihak berkuasa – Permohonan lesen pendudukan sementara ditolak oleh pihak berkuasa – Sama ada pemohon mempunyai harapan sah untuk memperoleh lesen pendudukan sementara – Sama ada pihak berkuasa memberi pemohon representasi yang, secara munasabahnya, diharapkan dilaksanakan oleh pihak berkuasa*

UNDANG-UNDANG PENTADBIRAN: *Semakan kehakiman – Permohonan – Semakan kehakiman terhadap keputusan pihak berkuasa – Permohonan lesen pendudukan sementara ditolak oleh pihak berkuasa – Pihak berkuasa tidak memberi apa-apa alasan untuk penolakan – Sama ada pihak berkuasa wajar memberi alasan untuk penolakan permohonan*

Pemohon, sebuah syarikat yang memajukan sektor pelancongan dan memiliki beberapa buah resort dan kafe ekopelancongan, telah memohon lesen pendudukan sementara untuk tiga lot tanah ('tanah-tanah') namun permohonannya ditolak. Menurut pemohon, pemohon telah menulis pada Menteri Besar Pahang ('MB Pahang') berkenaan permohonan lesen pendudukan sementara ini dan, dalam balasan beliau, MB Pahang menyatakan beliau tidak mempunyai apa-apa bantahan malah menyokong permohonan pemohon. Pemohon kemudian membuat permohonan lisan dalam satu mesyuarat bersama-sama Majlis Mesyuarat Kerajaan Negeri Pahang ('responden kedua'). Dalam mesyuarat yang sama, pemohon memaklumkan tentang sokongan MB Pahang akan permohonan tersebut. Berikutan itu, pemohon diberitahu bahawa permohonannya akan dinilai semula dan akan diproses selepas satu siasatan. Walau bagaimanapun, pemohon tidak menerima apa-apa maklum balas daripada responden kedua. Pemohon kemudian menerima makluman secara lisan oleh responden kedua bahawa permohonannya ditolak. Pemohon seterusnya mengemukakan

rayuan pada Pejabat Setiausaha Negeri dan membentangkan kertas kerja. Walau bagaimanapun, responden kedua menolak permohonan pemohon. Maka timbul permohonan semakan kehakiman ini terhadap keputusan responden-responden. Menyokong permohonannya, pemohon menyatakan bahawa: (i) sebelum ini, pemohon adalah pemilik lesen sementara untuk tanah-tanah tersebut dan semua bayaran lesen pendudukan tanah telah dijelaskan; (ii) MB Pahang telah menyokong permohonan pemohon tanpa apa-apa bantahan dan responden kedua menyatakan akan menilai semula permohonan pemohon dan mengambil tindakan untuk kelulusan. Susulan itu, pemohon mempunyai harapan sah untuk memperoleh lesen pendudukan sementara; dan (iii) tiada alasan yang dikemukakan oleh responden kedua berkenaan keputusan menolak permohonan pemohon.

Diputuskan (membenarkan permohonan):

(1) Demi membolehkan satu-satu harapan sah digunakan, perlu ditunjukkan bahawa pihak berkuasa telah memberi satu representasi yang, secara munasabahnya, diharapkan dilaksanakan oleh pihak berkuasa tersebut. Pemohon telah menerima surat daripada MB Pahang yang menyatakan beliau tiada apa-apa halangan malah menyokong permohonan pemohon. Apabila surat ini ditunjukkan, pemohon dimaklumkan bahawa satu pertimbangan semula akan dibuat pada permohonannya. Tindakan responden-responden adalah satu representasi yang diberikan oleh pihak yang mempunyai kuasa pada pemohon. Berdasarkan representasi tersebut, ditambah dengan kehadiran pemohon yang membentangkan kertas-kertas kerja dan fakta bahawa pemohon telah, sebelum ini, diberi lesen pendudukan sementara untuk tanah-tanah tersebut, pemohon mempunyai harapan sah. Permohonan pemohon untuk lesen pendudukan sementara diperintahkan agar dipertimbangkan semula oleh responden pertama, kedua dan/atau ketiga. (perenggan 40, 42, 45 & 62)

(2) Persoalan sama ada alasan keputusan perlu diberi oleh badan pentadbiran bergantung pada fakta dalam satu-satu kes. Jika keputusan tersebut melibatkan kepentingan awam, alasan keputusan tersebut wajar diberi. Pemohon mempunyai harapan sah. Oleh itu, dalam kes ini, alasan penolakan permohonannya wajar diberi oleh responden-responden. (perenggan 57 & 58)

***Obiter*:**

(1) Badan pentadbiran tidak boleh berlindung sebalik alasan bahawa undang-undang tidak mewajibkannya memberi alasan untuk keputusan yang dibuat. Demi menggalakkan ketelusan dalam keputusan badan pentadbiran, adalah satu tindakan yang baik bahkan dialu-alukan jika alasan diberi untuk keputusan yang dibuat. Ini dapat memberi gambaran yang jelas mengapa satu-satu permohonan atau keputusan permohonan orang awam ditolak dan mengelakkan apa-apa tohmahan salah guna

kuasa. Ini juga salah satu mekanisme untuk meningkatkan tata kelola pentadbiran Kerajaan yang lebih bertanggungjawab serta membantu sikap kebertanggungjawaban pihak berkuasa pentadbiran dalam keputusan yang diberi. Di samping itu, mahkamah berpeluang mengetahui sandaran keputusan tersebut sekiranya terdapat prosiding semakan kehakiman. (perenggan 54, 55 & 59)

Kes-kes yang dirujuk:

Attorney-General Of Hong Kong Appellant And Ng Yuen Shiu respondent [Appeal From The Court Of Appeal Of Hong Kong] [1983] 2 AC 629 ***(dirujuk)***

Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 CLJ 538 CA ***(dirujuk)***

Ho Yoke Keng v. Philip Lau Soo Fock & Another Appeal [2022] 6 CLJ 200 CA ***(dirujuk)***

Hotel Equatorial (M) Sdn Bhd v. National Union Of Hotel, Bar, Restaurant Workers & Anor [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 FC ***(dirujuk)***

John Peter Berthelsen v. Director-General Of Immigration Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(dirujuk)***

Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(dirujuk)***

Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(dirujuk)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(dirujuk)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(dirujuk)***

McInnes v. Onslow Fane [1978] 1 WLR 1520 ***(dirujuk)***

Merdeka University Bhd v. Government Of Malaysia [1982] 1 LNS 1 FC ***(dirujuk)***

Merdeka University Bhd v. Government Of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 HC ***(dirujuk)***

North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC ***(dirujuk)***

Oakley v. South Cambridgeshire District Council [2017] 1 WLR 3765 ***(dirujuk)***

Pengarah Tanah Dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise [1978] 1 LNS 143 FC ***(dirujuk)***

Pentadbir Tanah Dan Daerah Petaling & Ors v. Bandar Utama City Corporation Sdn Bhd & Anor And Another Appeal [2021] 5 CLJ 480 CA ***(dirujuk)***

Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang) Sdn Bhd & Ors And Another Appeal [2023] 2 CLJ 333 FC ***(dirujuk)***

R (On The Application Of MP) v. Secretary Of State For Health And Social Care [2021] 1 All ER 326 ***(dirujuk)***

Regina (CPRE Kent) v. Dover District Council [2018] 1 WLR 108 ***(dirujuk)***

Regina (Gallaher Group Ltd And Others) v. Competition and Markets Authority [2019] AC 96 ***(dirujuk)***

Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(dirujuk)***

Schmidt And Another v. Secretary of State for Home Affairs [1969] 2 Ch 149 ***(dirujuk)***

Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(dirujuk)***

Perundangan yang dirujuk:
National Land Code, ss. 41, 42

Sumber-sumber yang dirujuk:
C Forsyth, *The Provenance and Protection of Legitimate Expectation* [1988] CLJ 238
David SY Wong, *Tenure And Land Dealings In The Malay States*, 1975 Singapore University Press, hlm 100
Hj Salleh Buang, *Temporary Occupation Licences: Some Proposals For Reform* [1987] 2 MLJ cclii
Professor Alison L Young, *Stuck At A Crossroad? Substantive Legitimate Expectations In English Law* [2021] Cambridge Law Journal (CLJ) 179
Teo Keang Sood, *Disposal of State Land by Alienation: A Note* [1989] 1 MLJ xxxi
Wan Azlan Ahmad & Mohsin Hingun, *Legitimate Expectation and Locus Standi: A Note* [1994] 3 MLJ liv

Bagi pihak pemohon - Lusinthra Pillai Umadas; T/n Raj & Sach
Bagi pihak responden-responden - Abdul Hafiz Razak; Pejabat Penasihat Undang-undang Negeri Pahang

Dilaporkan oleh Najib Tamby

PENGHAKIMAN

Roslan Mat Nor PK:

Pendahuluan

[1] Ini adalah satu permohonan semakan kehakiman. Kebenaran untuk semakan kehakiman telah diberikan oleh mahkamah pada 29 Ogos 2022.

Fakta Ringkas

[2] Pemohon adalah merupakan syarikat yang didaftarkan di bawah Akta Syarikat 2016 yang memajukan sektor pelancongan dan memiliki beberapa buah resort dan kafe ekopelancongan. Responden pertama adalah merupakan Pegawai Daerah Pejabat Daerah dan Tanah Raub. Responden kedua adalah Majlis Mesyuarat Kerajaan Negeri Pahang (EXCO). Semakan kehakiman ini dibuat terhadap keputusan yang dikatakan telah dibuat oleh responden pertama pada 17 Januari 2022 yang menolak permohonan pemohon untuk lesen pendudukan sementara (TOL) di hartanah yang mempunyai nombor rujukan PTR1/03/T/0174/11, PTR1/03/T/0172/11 dan PTR1/03/T/0100/13.

[3] Pemohon dalam afidavitnya menyatakan bahawa pada tahun 2017 permohonan lesen pendudukan sementara (TOL) bagi Lot 172 dan 174 telah tidak dibenarkan. Pemohon telah menulis sepucuk surat rayuan bertarikh 29 Ogos 2018 kepada Yang Amat Berhormat Menteri Besar Pahang berkenaan permohonan lesen pendudukan sementara (TOL) di Lot 172 dan 174.

[4] Pemohon menyatakan bahawa beliau telah menerima surat balasan daripada Yang Amat Berhormat Menteri Besar Pahang pada 3 September 2018. Dalam surat, tersebut Yang Amat Berhormat Menteri Besar Pahang telah menyatakan bahawa beliau tidak mempunyai sebarang bantahan terhadap permohonan pemohon dan akan menyokong permohonan pemohon tersebut. Surat tersebut ditandakan sebagai eksh. 'SS-7'.

[5] Pemohon telah membuat permohonan lisan dalam satu mesyuarat bersama dengan responden kedua pada 8 Mei 2019. Ia disusuli dengan surat daripada peguamcara pemohon bertarikh 9 Mei 2019 di mana disahkan dalam surat tersebut permohonan lesen pendudukan sementara (TOL) untuk Lot 172, 174 dan 100 telah ditolak. Pemohon dalam mesyuarat tersebut telah memaklumkan kepada seorang yang bernama Encik Zamri bin Hasan bahawa Yang Amat Berhormat Menteri Besar Pahang melalui surat bertarikh 3 September 2018 telah menyatakan bahawa beliau menyokong permohonan tersebut. Ini telah menyebabkan Encik Zamri bin Hasan menyatakan bahawa permohonan tersebut akan dinilai semula dan akan diproses selepas suatu siasatan dijalankan. Encik Zamri bin Hasan telah menyatakan bahawa pihak pemohon akan diberi maklum balas dalam tempoh masa dua minggu dari tarikh mesyuarat. Walau bagaimanapun, tiada sebarang surat balasan diterima daripada responden kedua oleh pemohon. Pada 3 April 2020, pemohon akhirnya telah menerima maklumat secara lisan oleh responden kedua bahawa permohonan lesen sementara (TOL) berkenaan dengan Lot 172, 174 dan 100 telah ditolak oleh responden kedua.

[6] Ekoran daripada penolakan permohonan tersebut secara lisan, pemohon telah menulis surat kepada Pejabat Setiausaha Negeri (SUK) Pahang pada 18 Julai 2020 yang menyatakan bahawa pemohon ingin mengemukakan rayuan berkenaan permohonan lesen pendudukan sementara (TOL) di Lot 172, 174 dan 100 tersebut. Pemohon juga menyatakan bahawa responden kedua telah membuat siasatan pada tahun 2017 dan 2019 dan telah bersetuju untuk memperbaharui lesen pendudukan sementara (TOL) tersebut. Pemohon juga dikatakan telah menghantar 16 salinan kertas kerja berkenaan permohonan lesen pendudukan sementara (TOL) bagi Lot 172, 174 dan 100.

[7] Pemohon juga menyatakan bahawa beliau telah menghadiri Mesyuarat Jawatankuasa Penyelesaian Tanah Daerah Raub Bil.1/2021 dan telah membentangkan permohonan. Pemohon juga telah menerima surat daripada Pejabat SUK Pahang pada 24 Januari 2021 untuk menghadiri Mesyuarat Jawatankuasa Khas Pelaburan Dalam Bidang Pertanian (Pertanian, Penternakan dan Ternak Air) Negeri Pahang Darul Makmur Bil.2/2021 pada 26 April 2021. Pemohon telah membentangkan permohonan.

[8] Pemohon juga telah atas arahan lisan seorang pegawai daripada Pejabat SUK Pahang semasa mesyuarat pada 26 April 2021 itu telah menaikkan jumlah modal berbayar pemohon kepada RM100,000. Ia telah dilakukan pada 31 Mei 2021. Pada 8 Mac 2022, pemohon telah menerima surat daripada Pejabat SUK Pahang yang memaklumkan bahawa Majlis Mesyuarat Kerajaan Negeri Pahang Ke-47/2021 pada 22 Disember 2021 telah menolak permohonan lesen pendudukan sementara (TOL) pemohon untuk Lot 172, 174 dan 100. Pada 12 Mac 2022, pemohon telah menghantar surat rayuan kepada Yang Amat Berhormat Menteri Besar Pahang tetapi tidak menerima sebarang jawapan.

Alasan Permohonan

[9] Alasan-alasan permohonan semakan oleh pemohon adalah:

(i) pemohon merupakan pemilik lesen pendudukan sementara (TOL) untuk tanah-tanah tersebut sebelum ini. Bagi Lot 172 daripada tahun 2013 hingga 2016, bagi Lot 174 dari tahun 2013 hingga 2016 dan bagi Lot 100 mulai tahun 2015 hingga 2018. Pemohon juga dalam afidavitnya menyatakan bahawa segala bayaran lesen pendudukan sementara (TOL) bagi tempoh tersebut telah dijelaskan dan dikemukakan sebagai eksh. 'SS-4', 'SS-5' dan 'SS-6';

(ii) pemohon setuju untuk membuat bayaran lesen pendudukan sementara (TOL) dalam masa had yang ditetapkan tanpa sebarang penangguhan;

(iii) pemohon telah menaikkan modal berbayar kepada RM100,000; dan

(iv) Yang Amat Berhormat Menteri Besar Pahang telah menyatakan akan menyokong dan tidak mempunyai bantahan terhadap permohonan pemohon. Responden kedua menyatakan kepada pemohon bahawa pemohon akan dinilai semula dan diambil tindakan untuk kelulusan. Tiada alasan diberikan oleh responden kedua berkenaan dengan keputusan.

[10] Dalam afidavit sokongan pemohon, beliau menyatakan mempunyai harapan yang sah (legitimate expectation) untuk mendapatkan lesen pendudukan sementara (TOL) bagi Lot 172, 174 dan 100. Pemohon juga menyatakan dalam afidavit sokongannya di perenggan 24 bahawa beliau adalah peneraju bidang pelancongan eko Negeri Pahang dan telah membuat pelaburan kos dan masa yang tinggi agar Lot 172, 174 dan 100 tidak dicemari dan dijaga dengan baik. Di samping itu, ia juga menyumbang kepada pembangunan sektor pelancongan eko di Negeri Pahang dan Malaysia.

Jawapan Responden-Responden

[11] Responden-responden melalui afidavit Puan Nurul Syahirah binti Samsu Tajuddin telah mengesahkan bahawa Lot 172 dan Lot 174 telah diberikan lesen pendudukan sementara (TOL) bagi tahun 2013, 2014, 2015

dan 2016. Pemohon telah membuat bayaran lesen pendudukan sementara (TOL) bagi kedua-kedua lot tersebut. Sementara itu, bagi Lot 100 ia diberikan kepada pemohon bagi tahun 2015, 2016, 2017 dan 2018. Pemohon juga telah disahkan telah menjelaskan bayaran-bayaran lesen pendudukan sementara (TOL) tersebut.

[12] Responden-responden semasa merujuk surat daripada Yang Amat Berhormat Menteri Besar Pahang yang dikatakan bertarikh 3 September 2019 yang menyatakan bahawa tiada halangan dan menyokong permohonan tersebut adalah tertakluk kepada syarat-syarat dan peraturan sedia ada. Pada masa yang sama, Yang Amat Berhormat Menteri Besar Pahang tidak memberi apa-apa kelulusan permohonan lesen pendudukan sementara (TOL) dan tidak mempunyai kuasa secara persendirian untuk mengeluarkan lesen pendudukan sementara (TOL).

[13] Responden-responden juga mengakui penerimaan salinan kertas kerja daripada pemohon bertarikh 21 Julai 2022 dan menegaskan bahawa penerimaan tersebut bukanlah bermakna kelulusan. Begitu juga responden-responden mengakui bahawa pembentangan taklimat permohonan tanah Kerajaan dalam mesyuarat jawatankuasa penyelesaian tanah Daerah Raub Bil.1/2021 telah dilakukan oleh pemohon. Begitu juga dalam mesyuarat jawatankuasa khas pelaburan dalam bidang pertanian (pertanian, penternakan dan ternak air) Negeri Pahang. Responden-responden mengakui bahawa terdapat arahan daripada seorang pegawai yang meminta supaya pemohon menaikkan modal berbayar. Responden-responden juga mengakui surat-surat yang dikemukakan berkenaan rayuan untuk penolakan permohonan lesen pendudukan sementara (TOL) tersebut.

[14] Responden-responden menyatakan bahawa lesen pendudukan sementara (TOL) bagi Lot 172 telah tamat pada 2016, Lot 174 tamat pada 2016 dan Lot 100 telah tamat pada 2018. Oleh yang demikian, dalam afidavit Puan Nurul Syahirah dinyatakan bahawa permohonan pembaharuan lesen pendudukan sementara (TOL) bagi Lot 172, Lot 174 dan Lot 100 dalam permohonan semakan kehakiman adalah bersifat akademik. Responden pertama dan responden kedua juga menyatakan bahawa mereka tidak berkewajipan dan perlu di sisi undang-undang untuk memberikan alasan penolakan permohonan lesen pendudukan sementara (TOL) tersebut.

Analisa

[15] Budi bicara pentadbiran dalam memutuskan sesuatu keputusan adalah terdedah kepada tindakan semakan kehakiman. Ia adalah bertujuan untuk mahkamah meneliti sama ada proses keputusan tersebut dibuat mengikut undang-undang. Ia bukannya tindakan untuk mempersoalkan keputusan yang telah dibuat.

[16] Pertimbangan yang perlu diberikan semasa meneliti semakan kehakiman turut dinyatakan oleh Mahkamah Persekutuan dalam kes *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559; [1998] 2 MLJ 513 seperti berikut: A

> In order to interfere by judicial review, the courts below must look for any illegality or irrationality or procedural impropriety in the decision-making process of the tribunal in arriving at its interpretation of s. 6(i)(b) of the Enactment, and not at the decision itself. If there was such defect in the decision-making process, then the court is of course obliged to set aside the whole decision, including any award of the tribunal. B

[17] Selain daripada itu, semakan kehakiman bukan mengganggu keputusan yang telah dibuat, tetapi ialah penelitian bagaimana proses keputusan itu dibuat. Ini telah dinyatakan dalam kes *Hotel Equatorial (M) Sdn Bhd v. National Union Of Hotel, Bar, Restaurant Workers & Anor* [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155; [1984] 1 MLJ 363 seperti berikut: C

> We do not think that a proper approach had been adopted by the learned Judge of the High Court in dealing with the matter before him. In the exercise of its inherent supervisory jurisidiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit. Speaking of the inherent supervisory jurisdiction of the superior court or High Court, Lord Sumner in the case of *Rex v. Nat Bell Liquors Ltd* [1922] 2 AC 128 said at page 156: D E F
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> > That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

[18] Dalam kes *Pengarah Tanah Dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise* [1978] 1 LNS 143; [1979] 1 MLJ 135 dinyatakan: G

> Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (*ante*) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of H I

the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts L.J. in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434 442).

[19] Pada masa yang sama, mahkamah dalam pendengaran semakan kehakiman perlu menggunakan ujian objektif. Ini telah dinyatakan oleh Mahkamah Persekutuan di dalam kes *Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541 seperti berikut:

> [27] Having considered the issue at hand, I agree with learned counsel for the applicant that the law on judicial review has advanced from the subjective to that of the objective test. Hence, in *Merdeka University Berhad v. Government of Malaysia* [1982] 1 LNS 1; [1982] 2 MLJ 243 (FC), Suffian LP observed:
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> > It will be noted that section 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc'. In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable – see the cases cited by the learned Judge at page 360.
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> (See also *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 (FC); *John Peter Berthelsen v. Director General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160; [1987] 1 MLJ 134 (SC); *Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186; [1990] 1 MLJ 351 (SC); *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 (CA); *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 (CA); *R Rama Chandran* (*supra*); *YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337 (FC); *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; [2006] 6 MLJ 213 (CA)).
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> As laid down by the above authorities it is therefore trite that the test applicable in judicial review is the objective test.

[20] Ujian objektif yang dimaksudkan bagi semakan kehakiman telah dijelaskan oleh Hakim Abdoolcader di dalam kes *Merdeka University Bhd v. Government Of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191; [1981] 2 MLJ 356 seperti berikut:

> It has been suggested in the past that the qualification of the statement of a power by introductory words in the form of a subjective formula such as His Majesty's satisfaction on the matters specified in section 6(1) of the 1971 Act might be sufficient to exclude judicial review, but the modern and correct view clearly is for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds. The House of Lords established in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014, 1074 that conferring discretion on an authority in the subjective form 'if he is satisfied' does not exclude judicial review if objective facts have to be ascertained before arriving at such satisfaction, and further that the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable. This is the construction adopted by the Privy Council in Nakkuda, *Ali v. MF De S Jayaratne* [1951] AC 66 as against that of the majority in the House of Lords in *Liversidge v. Anderson* [1942] AC 206, and in *Regina v. Inland Revenue Commissioners, Ex parte Rossminster Ltd & Ors* [1980] AC 952, 1000, 1011, 1025 the Law Lords have now openly acknowledged that the majority of the House in Liversidge [1942] AC 206 were expediently wrong and the dissenting speech of Lord Atkin was right (per Lord Wilberforce at page 1000; per Lord Diplock at page 1011; per Lord Scarman at page 1025).

Ia telah disahkan oleh Mahkamah Persekutuan dalam kes yang sama *Merdeka University Bhd v. Government Of Malaysia* [1982] 1 LNS 1; [1982] 2 MLJ 243.

[21] Apa yang jelas ialah dalam meneliti sama ada satu keputusan pihak berkuasa perlu dilakukan semakan kehakiman ialah mahkamah perlu melihat:

(i) sama ada pihak berkuasa tersebut mempunyai kuasa di sisi undang-undang atau melampaui bidang kuasa mereka atau berlawanan dengan bidang kuasa (*ultra vires*);

(ii) adakah keputusan tersebut tidak munasabah dan tidak setimpal; dan

(iii) adakah terdapat kejanggalan (impropriety) prosedur dalam proses membuat keputusan tersebut.

[22] Dalam kes ini adalah fakta jelas menunjukkan bahawa tanah-tanah yang melibatkan pemohon adalah tertakluk kepada lesen pendudukan sementara (TOL) yang dikeluarkan oleh pihak Kerajaan Negeri. Adalah menjadi prinsip undang-undang termaklum bahawa apabila tamat tempoh kebenaran yang diberikan, maka ia tidak menjadikan secara automatik hak

pemohon untuk diberikan lesen tersebut. Hakikat ini telah dinyatakan di dalam buku *Tenure And Land Dealings In The Malay States*, David SY Wong 1975 Singapore University Press di hlm. 100 seperti berikut:

> These "licences" which are, as should be stressed, a statutory creation, have a unique nature and effect. They are issued in consideration of a specified fee. Upon the expiry of such a licence, its holder may by application be issued a fresh licence whereby he could occupy the land in continuation. This is commonly said to be a renewal of his expired licence, but as should be pointed out, the holder has no legal right to such renewal.

[23] Hakikat TOL dapat dilihat dalam penjelasan yang menarik dalam artikel *Temporary Occupation Licences: Some Proposals For Reform* [1987] 2 MLJ cclii oleh Hj Salleh Buang seperti berikut:

> TOL, by its very apt name, means just what it is: a licence, a permission, of a temporary nature, granted by the State authority, for some restricted and permitted purpose, for which otherwise the person or corporation would have become a trespasser, an illegal squatter, if not for the permission.
>
> The rights granted under the TOL are not only limited or restricted as to purpose or nature, but also as to time. A TOL expires at the end of each calendar year, *ie*, at December 31, unless it is terminated earlier by the decision of the State authority.

Sama Ada Pihak Berkuasa Tersebut Mempunyai Kuasa Di Sisi Undang-undang Atau Melampaui Bidang Kuasa Mereka Atau Berlawanan Dengan Bidang Kuasa (*Ultra Vires*)

[24] Seksyen 42 Kanun Tanah Negara (KTN) memperuntukkan seperti berikut:

> **42 Powers of disposal**
>
> (1) Subject to subsection (2), the State Authority shall have power under this Act:
>
> (a) to alienate State land in accordance with section 76;
>
> (b) to reserve State land, and grant leases of reserved land, in accordance with the provisions of Chapter 1 of Part Four;
>
> **(c) to permit the occupation of State land, reserved land and mining land under temporary occupation licences issued in accordance with the provisions of Chapter 2 of Part Four;**
>
> (d) to permit the extraction and removal of rock material from any land, other than reserved forest, in accordance with the provisions of Chapter 3 of Part Four;

(e) to permit the use of air space on or above State land or reserved land in accordance with the provisions of Chapter 4 of Part Four provided that such air space shall be within the confines of a structure of any description erected thereon.

(2) Nothing in this Act shall enable the State Authority:

(a) to dispose of any land for the purposes of mining (within the meaning of any written law for the time being in force relating to mining);

(b) to permit the extraction or removal of rock material from any land for the purpose of obtaining metal or mineral therefrom;

(c) to dispose of any land for the purpose of the removal of forest produce therefrom; or

(d) to alienate any land so as to have the effect of less than two-fifths of a hectare of land subject to the category "agriculture" or to any condition requiring its use for any agricultural purpose being held by more than one person or body, provided that the State Authority may, under exceptional circumstances, alienate such land to more than one person or body notwithstanding that it is less than two-fifths of a hectare. (penekanan ditambah)

[25] Hakikat bidang kuasa Pihak Berkuasa Negeri untuk memberi milik/memindahkan (alienate) tanah adalah terletak di bawah ss. 40, 41 dan 42 KTN dinyatakan dalam kes *Ho Yoke Keng v. Philip Lau Soo Fock & Another Appeal* [2022] 6 CLJ 200 seperti berikut:

[23] We agree with counsel for the defendants that nowhere in the Court of Appeal's order states or recognises that plaintiff has the rights to the 1/2 undivided share of the land. This is also consistent with the law that the power to alienate the land is with the State Authority as provided under ss. 40, 41 and 42 of the National Land Code ("the NLC") which states:

Section 40.

There is and shall be vested solely in the State Authority the entire property in:

(a) all State land within the territories of the State;

(b) all minerals and rock material within or upon any land in the State the rights to which have not been specifically disposed of by the State Authority.

Section 41.

Without prejudice to its powers and rights under any other written law for the time being in force, **the State Authority shall have**:

(a) all the powers of disposal conferred by section 42 with respect to:

(i) property vested in it under section 40;

(ii) **reserved land**; and

(iii) mining land,

which powers shall be exercised in such manner and to such extent as is authorised by this Act, and not otherwise; and

(b) all the rights in reversion and other similar rights conferred on it by section 46.

Section 42.

(1) Subject to subsection (2), **the State Authority shall have power under this Act:**

(a) to alienate State land in accordance with section 76;

(b) **to reserve State land, and grant leases of reserved land**, in accordance with the provisions of Chapter 1 of Part Four;

(c) to permit the occupation of State land, reserved land and mining land under temporary occupation licences issued in accordance with the provisions of Chapter 2 of Part Four;

(d) to permit the extraction and removal of rock material from any land, other than reserved forest, in accordance with the provisions of Chapter 3 of Part Four;

(e) to permit the use of air space on or above State land or reserved land in accordance with the provisions of Chapter 4 of Part Four provided that such air space shall be within the confines of a structure of any description erected thereon.

(penekanan ditambah)

[26] Ia juga dapat dilihat di dalam perbincangan yang menarik dalam artikel yang bertajuk *Disposal of State Land by Alienation: A Note* oleh Teo Keang Sood [1989] 1 MLJ xxxi. Oleh itu, isu sama ada responden-responden mempunyai kuasa untuk membuat keputusan yang melibatkan pemohon dalam kes ini adalah satu yang tidak boleh dipertikaikan. Ini ditambah pula dengan hujahan lisan Peguam Persekutuan Encik Abdul Hafiz Razak yang menyatakan bahawa keputusan yang dilakukan oleh responden-responden adalah berkaitan langsung dengan permohonan pemohon untuk lesen pendudukan sementara (TOL).

[27] Dalam kes ini, isu berkenaan sama ada Pihak Berkuasa Negeri mempunyai kuasa untuk memutuskan dan membenarkan satu permohonan lesen pendudukan sementara (TOL) adalah suatu yang bukan isu dan tidak dipertikaikan oleh pihak pemohon. Ia adalah di dalam bidang kuasa Pihak Berkuasa Negeri. Apa yang menjadi isu dalam kes ini ialah, adakah keputusan yang dikeluarkan oleh responden-responden melalui surat mereka di eksh. 'SS-17' di dalam afidavit sokongan mewajarkan satu semakan kehakiman dibuat terhadap keputusan tersebut.

[28] Peguam Persekutuan bagi pihak responden berhujah bahawa pemohon tidak mempunyai *locus standi* disebabkan lesen pendudukan sementara (TOL) telah tamat tempoh. Oleh itu tidak timbul semakan kehakiman perlu dilakukan ke atas keputusan tersebut dan ianya adalah satu yang akademik. Namun apabila dilihat kepada 'SS-17', tersebut telah terdapat keputusan terhadap rayuan pihak pemohon yang timbul ekoran daripada permohonan untuk mendapatkan lesen pendudukan sementara (TOL) tersebut. Ini bermakna adalah sukar untuk mahkamah bersetuju dengan pihak responden bahawa pemohon tidak mempunyai *locus standi* dalam kes ini.

Adakah Keputusan Tersebut Tidak Munasabah Dan Tidak Setimpal Dan Adakah Terdapat Kejanggalan (Impropriety) Prosedur Dalam Proses Membuat Keputusan Tersebut?

Harapan Yang Sah (Legitimate Expectation)

[29] Pemohon menyatakan bahawa dia mempunyai harapan yang sah di sisi undang-undang bagi mendapatkan keputusan yang sewajarnya daripada responden. Ia adalah berdasarkan kepada fakta bahawa:

(i) pemohon telah diberikan lesen pendudukan sementara (TOL) bagi Lot 172 daripada tahun 2013 hingga 2016, bagi Lot 174 dari tahun 2013 hingga 2016 dan bagi Lot 100 mulai tahun 2015 hingga 2018. Pemohon juga telah menyelesaikan semua bayaran lesen pendudukan sementara (TOL) tersebut;

(ii) pemohon menerima surat daripada Yang Amat Berhormat Menteri Besar Pahang;

(iii) ekoran daripada surat tersebut pihak responden pertama telah bersetuju untuk meneliti semula permohonan pihak pemohon;

(iv) pemohon telah membuat pembentangan di peringkat daerah dalam mesyuarat jawatankuasa penyelesaian tanah Daerah Raub Bil.1/2021;

(v) pemohon telah membentangkan di peringkat negeri dalam mesyuarat jawatankuasa khas pelaburan dalam bidang pertanian (pertanian, penternakan dan ternak air) Negeri Pahang;

(vi) pemohon telah mengambil tindakan menambah modal syarikat setelah diminta berbuat demikian oleh salah seorang pegawai responden.

[30] Mahkamah sedar bahawa sesuatu semakan kehakiman boleh dibuat sekiranya terdapat keadaan di mana pemohon mempunyai harapan yang sah (legitimate expectation). Ia telah diperkenalkan oleh Lord Denning dalam kes *Schmidt And Another v. Secretary of State for Home Affairs* [1969] 2 Ch 149 seperti berikut:

> The third point is whether there is any ground for saying that the Home Secretary did not observe the precepts of natural justice. Mr Quintin Hogg submitted that the Minister ought to have given the students a hearing

before he refused to extend their stay in this country. I see no basis for this suggestion I quite agree, of course, that where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf. But in the case of aliens, it is rather different: for they have no right to be here except by licence of the Crown. And it has been held that the Home Secretary is not bound to hear representations on their behalf, even in the case of a deportation order, though, in practice he usually does so. It was so held in *Rex v. Leman Street Police Station Inspector and Secretary of State for Home Affairs, Ex parte Venicoff* [1920] 3 K.B. 72, which was followed by this court in *Soblen*'s case [1963] 2 Q.B. 243. Some of the judgments in those cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in *Ridge v. Baldwin* [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

[31] Sementara itu di negara ini, Mahkamah Rayuan dalam kes *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538 telah menghuraikan secara mendalam prinsip harapan yang sah dan perkembangannya seperti berikut:

[50] The principle of legitimate expectation was first perceived by Lord Denning MR in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149, CA to denote something less than a right which may nevertheless be protected by the principles of natural justice. Put in another way, a legitimate expectation amounts to an expectation of receiving some benefit or privilege to which the individual has no right. It has been used by the courts on numerous occasions and in different contexts with the result that "there are many semantic confusions which have bedevilled this area of our law" (per Simon Brown LJ, in *R v. Devon County Council, ex p. Baker* [1995] 1 All ER 73, CA). In the words of Taylor J, in *R v. Secretary of State for the Home Department, ex p. Ruddock* [1987] 2 All ER 518, "the doctrine of legitimate expectation in essence imposes a duty to act fairly." The duty to act fairly applies in the context of legitimate procedural expectations as demonstrated by the case of *R v. Liverpool Corpn, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, CA. In *R v. Secretary of State for the Home Department, ex p Ruddock* (*supra*), the substantive benefit was that individuals not falling within the government's published criteria for telephone tapping would not have their telephone calls intercepted by the security services.

[51] I venture to say that even where no promise of a benefit has been made and there is no established practice of granting that benefit, the person concerned is, elementarily, entitled to be treated fairly. Thus, stall-holders in a market are entitled to be consulted before charges are

increased (*R v. Birmingham C.C. ex p. Dredger* [1993] COD 340). But residents in an old people's home to whom no promise of consultation has been made need not be consulted before the local authority closes the home (*R. v. Devon County Council ex p. Baker* (*supra*) at p. 89 adopting the approach of *A.G. for New South Wales v. Quin* [1990] 93 ALR 1 at 39).

[52] Whether an expectation exists, is clearly a question of fact. So, if a person did not expect anything, then there is nothing that the doctrine of legitimate expectation can protect. Here, the appellants expected the respondents to keep to their promises and so the appellants expect that the doctrine of legitimate expectation to protect them and the said doctrine can be invoked to protect them. As I said, the statement of claim made reference to the doctrine of legitimate expectation and I must give effect to it in this judgment. But if a person is unaware of an undertaking made by a public authority, then he cannot expect compliance with that undertaking (*Chundawara v. Immigration Appeal Tribunal* [1988] Imm. AR 161, where an unincorporated but ratified treaty of which the claimant was unaware could not found legitimate expectation). A taxpayer, for instance, must rely upon a representation from the Revenue before his expectation will be protected (*R. v. Inland Revenue Commissioners ex p. Matrix-Securities Ltd* [1994] 1 WLR 334). But taxpayers seeking revenue clearance for their proposals must make full disclosure before the revenue's assurances will be binding (*R v. Inland Revenue Commissioners ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545).

[32] Mahkamah Agung dalam kes *John Peter Berthelsen v. Director-General Of Immigration Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160; [1987] 1 MLJ 134 setelah merujuk kepada keputusan Megarry VC dalam kes *McInnes v. Onslow Fane* [1978] 1 WLR 1520 dalam menyatakan keadaan di mana mahkamah berhak untuk campur tangan di dalam keputusan pihak berkuasa pentadbiran menyatakan seperti berikut:

Third, there is an intermediate category, which he termed the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority.

[33] Mahkamah juga merujuk kepada artikel bertajuk Abdoolcader SCJ, *Legitimate Expectation and Locus Standi: A Note* [1994] 3 MLJ liv oleh Wan Azlan Ahmad dan Mohsin Hingun yang membincangkan isu harapan yang sah dan *locus standi* ekoran daripada keputusan dalam kes *JP Berthelsen* (*supra*).

In *Berthelsen*, the appellant's employment pass, issued under reg. 19 of the Immigration Regulations 1963, was terminated on the ground that he had contravened or failed to comply with the terms of its issuance, and that his continued presence in the country would be prejudicial to the security

A of the country. The appellant was not given a hearing before the pass was revoked and the Supreme Court, rightly, emphasised the nature of judicial review: that the decision to cancel the permit was an executive discretion Page lv, which as far as merit is concerned, remains outside the purview of the courts. While this discretion is one for the executive, it remains a discretion to be exercised according to law. Fundamental in this respect B is the operation of the rules of natural justice, and we may also add, they include what are now established components of these common law procedural safeguards: the doctrine of legitimate expectation and the duty to act fairly.

[34] Harapan yang sah atau legitimate expectation adalah berasal daripada C prinsip German yang dikenali sebagai Principal of Vertrauenschutz – the protection of promises and of trust in the administration. Ini telah dinukilkan oleh C Forsyth dalam artikelnya *The Provenance and Protection of Legitimate Expectation* [1988] CLJ 238. Di bawah undang-undang Inggeris, terdapat dua harapan yang sah iaitu satu yang dikenali sebagai harapan yang sah substantif D (substantive legitimate expectation) dan harapan yang sah prosedur (procedural legitimate expectation). Perbincangan berkenaan dengan kedudukan harapan yang sah substantif (substaintive legitimate expectation) dinyatakan oleh Professor Alison L Young di dalam artikelnya *Stuck At A Crossroad? Substantive Legitimate Expectations In English Law* [2021] Cambridge Law Journal (CLJ) 179 seperti berikut: E

> If we are to justify a preference for either a narrow doctrinal or a broad principled approach to substantive legitimate expectations, we need to analyse further consequences of these distinct forms of judicial reasoning. The doctrinal and purposive approaches are similar to rule-based and particularistic decision-making, as explained by Frederick Schauer. A F doctrinal approach, like a rule-based approach, focuses on applying rules to a specific situation. Particularistic decision-making, in a similar manner to a principled approach, focuses on reasoning from first principles to reach the right outcome, rather than applying rules. There are three differences between the two approaches. First, a rule-based approach is more likely to create legal certainty and clarity. In contrast, although a principled G approach may be less certain, with its application to a particular case being harder to predict, it may be more likely to reach the right outcome. Rules make generalisations. Consequently, there may be particular facts or circumstances about an individual applicant that would be overlooked when applying a rule-based approach.
>
> H Second, a rule-based approach is more likely to facilitate formal equality, whereas a particularistic approach is more likely to facilitate substantive equality. When applying a rules-based approach, those falling into the same category of rule receive the same outcome. However, this may give rise to inequalities when we assess how the principles underpinning the rules would apply to similar individuals. Whilst like cases may be treated I alike, this may mean that some of those who deserve to have their substantive legitimate expectation protected receive no legal protection. In

this sense, the law is treating them differently from those who fall within the current rules. For example, to provide a protection for an individual in a similar situation to that of Mandalia, who was unaware of the policy that should have been applied to him, favours formal equality as his situation is distinct from that which arose in Coughlan where a specific individual was aware of the representation made to her of a particular outcome. Yet to confine legitimate expectations in this manner undermines substantive equality. Good administration and trust in the administration would be undermined both by failing to uphold a promise where there was no good reason not to do so and by failing to apply a policy to an individual where there was no justification not to do so.

Third, the different approaches distribute more or less autonomy to administrative decision-makers and rule-makers. A rule-based approach places relatively more power in the hands of the organisation making the rules, rather than the organisation applying the rules. A principled-based approach places more power in the hands of the organisation applying the principles, with a smaller role being played by the institution developing the principles. These distinctions are normally applied to situations in which the institutions inventing and applying the rules are distinct, for example when distinguishing between situations in which a legislature provides an administrator with a clear set of rules to apply, or with a broad discretion as to when an individual should receive a specific benefit. An administrator has more autonomy when they are given a discretionary power then when they are merely required to apply a set of clear rules established by the legislature.

[35] Dalam konteks harapan yang sah prosedur (procedural legitimate expectation), rumusan yang dibuat oleh Lord Carnwath di dalam kes *Regina (Gallaher Group Ltd And Others) v. Competition and Markets Authority* [2019] AC 96 menjelaskan seperti berikut:

38 In *Ex p Unilever Plc* the Court of Appeal held that the revenue should not be permitted without warning to apply a strict time limit for submission of claims to loss relief, when to do so departed from a practice accepted by them without objection for some 20 years. The judge (Macpherson of Cluny J) had held that the revenue's conduct amounted to "a representation in Preston terms", or, if not, had led to "unfairness" and "an abuse of power": p 689. In the Court of Appeal the main issue seems to have been whether the taxpayer could succeed in the absence of a representation by the revenue which was "clear, unambiguous and devoid of relevant qualification", as stated in previous Court of Appeal authority: p. 693. Bingham MR held that, on "the unique facts" of the case, to reject the claims was "so unfair as to amount to an abuse of power" (p 691), and "so unreasonable as to be, in public law terms, irrational": p 692.

39 In a concurring judgment, Simon Brown LJ, at pp. 693-695, under the heading "Legitimate expectation or nothing?", sought to relate the case more directly to Lord Diplock's famous definition of irrationality as a

decision "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it": *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 410. It was in that context that he introduced the idea of "conspicuous unfairness": He said [1996] STC 681, 694-696:

> 'Unfairness amounting to an abuse of power' as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power.
>
> "In short", he regarded the "MFK category of legitimate expectation" as "essentially but a head of Wednesbury unreasonableness": p 695A-B. On the facts of the case, he held, at p 697C, that the test was satisfied, observing that he could think of "no surer guide than Macpherson of Cluny J" in determining "the border between on the one hand mere unfairness-conduct which may be characterised as 'a bit rich' but nevertheless understandable-and on the other hand a decision so outrageously unfair that it should not be allowed to stand."

40 I have quoted at some length from these judgments to show how misleading it can be to take out of context a single expression, such as "conspicuous unfairness", and attempt to elevate it into a free-standing principle of law. The decision in *Ex p Unilever plc* [1996] STC 681 was unremarkable on its unusual facts, but the reasoning reflects the case law as it then stood. Surprisingly, it does not seem to have been strongly argued (as it surely would be today) that a sufficient representation could be implied from the revenue's consistent practice over 20 years: see *eg*, *De Smith's Judicial Review*, para. 12-021. It seems clear in any event from the context that Simon Brown LJ was not proposing "conspicuous unfairness" as a definitive test of illegality, any more than his contrast with conduct characterised as "a bit rich". They were simply expressions used to emphasise the extreme nature of the Revenue's conduct, as related to Lord Diplock's test. In modern terms, and with respect to Lord Diplock, "irrationality" as a ground of review can surely hold its own without the underpinning of such elusive and subjective concepts as judicial "outrage" (whether by reference to logical or moral standards).

41 In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand-or, in Lord Dyson MR's words [2016] Bus LR 1200, para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances" - is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review,

notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged.

[36] Malahan baru-baru ini, Mahkamah Rayuan di United Kingdom telah tidak membezakan di antara harapan yang sah prosedur dengan harapan yang sah substantif iaitu di dalam kes *R (On The Application Of MP) v. Secretary Of State For Health And Social Care* [2021] 1 All ER 326 seperti berikut:

> [51] Mr Coppel argued that procedural and substantive legitimate expectation need to be distinguished. On that footing, he submitted that the key authorities in the context of the present appeal are those dealing with the former, such as *CCSU*, *BAPIO* and *Brooke Energy*, and, as regards the last of these, he observed that the case was a bad one on the facts and that there was no reference in the judgments to either *CCSU* or *BAPIO*. The upshot, Mr Coppel maintained, is that a procedural legitimate expectation can be established by showing a 'sufficiently settled and uniform practice'. There is, he said, no need for a practice to be 'unequivocal', and the Judge erred in law in approaching matters on the basis of such a requirement and by ignoring the qualifier 'sufficiently' before 'settled and uniform practice'.
>
> [52] In my view, however, the distinction which Mr Coppel sought to draw between procedural and substantive legitimate expectation is not justified. Mr Palmer argued that cases concerned with substantive legitimate expectation are also of relevance when considering procedural legitimate expectation, and I agree. The 'clear, unambiguous and devoid of relevant qualification' formula first appeared when it was as yet still controversial whether legitimate expectation extended to substantive rather than merely procedural benefits and it and its analogues have not hitherto been held to apply only to substantive legitimate expectation. In fact, Flaux LJ referred to a practice needing to be 'clear, unequivocal and unconditional' in *Brooke Energy*, a consultation case, and the Court of Appeal spoke of the 'fundamental ingredients' of procedural and substantive legitimate expectation being the same in *Heathrow Hub*. It is true that in Badger Trust Bean LJ said that a 'representation or promise which is clear, unambiguous and devoid of relevant qualification' is a requirement for establishing a substantive legitimate expectation, but he had no occasion to comment on whether procedural legitimate expectation also requires such a representation or promise.
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> [53] The correct position appears to me to be as follows:
>
> (i) An express promise, representation or assurance needs to be 'clear, unambiguous and devoid of relevant qualification' to give rise to any legitimate expectation, whether substantive or procedural;

A (ii) A practice must be tantamount to such a promise if it is to found any legitimate expectation. It may be, as Sedley LJ said in *BAPIO*, that a practice does not have to be entirely unbroken, but it does have to be so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed in the future.

B [54] In the circumstances, I do not think the Judge can be said to have erred in referring either to 'settled and uniform practice' (without adding 'sufficiently') or to 'unequivocal practice'. Such expressions were apt to describe the sort of practice required to establish a legitimate expectation. For good measure, I do not read the judgment as treating an 'unequivocal assurance' as crucial to the decision. Having concluded in para [84] that C there had not been a 'settled and uniform practice', the Judge went on to say that '[furthermore, and additionally, it would be difficult to regard any previous practice as giving rise to an unequivocal assurance that the two particular changes in issue ... would be subject to public consultation'. Absence of an 'unequivocal assurance' was thus an extra reason for rejecting legitimate expectation.

D **[37]** Ini bermakna terdapat pandangan yang menyatakan bahawa bagi membolehkan satu harapan yang sah prosedur tidak diperlukan sebarang penyataan oleh pihak berkuasa. Ia hanyalah berkaitan dengan harapan yang sah substantif.

E **[38]** Sementara itu, dalam konteks undang-undang Malaysia adalah didapati bahawa pemakaian prinsip harapan yang sah telah dibincangkan oleh Mahkamah Persekutuan di dalam kes *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 yang mengesahkan bahawa prinsip harapan yang sah bukan F hanya dalam prosedur tetapi juga dalam substantif.

[39] Dalam kes *Attorney-General Of Hong Kong Appellant And Ng Yuen Shiu respondent [Appeal From The Court Of Appeal Of Hong Kong]* [1983] 2 AC 629, Majlis Privy telah memberikan penjelasan berkenaan dengan prinsip harapan yang sah dan pemakaiannya yang dapat memberi panduan seperti berikut:

G The narrower proposition for which the applicant contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has "a legitimate expectation" of being accorded such a hearing. The phrase "legitimate expectation" in this context originated in the judgment of Lord Denning M.R. in *Schmidt v. Secretary of Stare for Home Affairs* [1969] 2 Ch. 149, 170. H It is many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In *Salemi v. MacKellar (No. 2)* [1977] 137 C.L.R. 396, 404, Barwick C.J. construed the word "legitimate" in that phrase as expressing the concept of "entitlement or recognition by law." So understood, the expression (as Barwick C.J. rightly observed) "adds I little, if anything, to the concept of a right." With great respect to Barwick C.J., their Lordships consider that the word "legitimate" in that

expression falls to be read as meaning "reasonable." Accordingly "legitimate expectations" in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864. So it was held in *Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain (No. 2)* [1979] 1 W.L.R. 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.

The decision of the Court of Appeal in the *St. Germain* case was approved by the House of Lords recently in *O'Reilly v. Mackman* [1983] 2 A.C. 237 where Lord Diplock, with whose speech the other Law Lords present agreed, said, at p. 275:

> It is not, and it could not be, contended that the decision of the board awarding him forfeiture of remission had infringed or threatened to infringe any right of the appellant derived from private law, whether a common law right or one created by a statute. Under the Prison Rules remission of sentence is not a matter of right but of indulgence. So far as private law is concerned all that each appellant had was a legitimate expectation, based upon his knowledge of what is the general practice, that he would be granted the maximum remission, permitted by rule 5(2) of the Prison Rules, of one-third of his sentence if by that time no disciplinary award of forfeiture of remission had been made against him. So the second thing to be noted is that none of the appellants had any remedy in private law.
>
> In public law, as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted outwith the powers conferred upon it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice: which means no more than to act fairly towards him in carrying out their decision-making process, and I prefer so to put it.
>
> The expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.

[40] Apa yang jelas daripada deretan kes-kes yang dinyatakan di atas ialah bagi membolehkan sesuatu harapan yang sah digunakan perlu ditunjukkan bahawa pihak berkuasa telah memberikan suatu representasi yang secara munasabahnya diharapkan dilaksanakan oleh pihak berkuasa tersebut.

Mahkamah berpendapat perlu ada keterangan yang menunjukkan bahawa pernyataan telah dibuat oleh pihak berkuasa yang memberikan harapan kepada orang awam untuk bergantung kepada penyataan tersebut untuk sesuatu tindakan yang diharapkan akan dilakukan oleh pihak berkuasa tersebut. Oleh yang demikian mahkamah merujuk kepada keputusan Mahkamah Persekutuan di dalam kes *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729 di mana Mahkamah Persekutuan menyatakan bahawa penggunaan prinsip harapan yang sah adalah bergantung kepada fakta kes dan tidak boleh sekali-kali mengatasi kuasa tersurat yang dinyatakan di bawah undang-undang bertulis. Hakim Allauddin Mohd Sheriff menyatakan seperti berikut:

> [29] Kami juga berpendapat bahawa keputusan majoriti Mahkamah Rayuan adalah tepat apabila dinyatakan 'Whether or not the doctrine of legitimate expectation applies depends on the facts of each case, it cannot and should not override the express statutory power vested in the State Authority.'
>
> **Adakah Sebarang Perjanjian Terjalin Antara Perayu Dan responden Dan Adakah Perayu Mendapat Apa-apa 'Beneficial Interest' Apabila MMKN Meluluskan Secara Dasar Permohonan Perayu?**
>
> [30] Dengan hanya permohonan perayu untuk mendapatkan tanah telah diluluskan ianya tidak bermakna Kerajaan Negeri telah terikat secara kontraktual hingga menyebabkan Kerajaan Negeri tidak boleh lagi membuat keputusan untuk membatalkan kelulusan yang telah diberikan. Mengikut Perlembagaan Persekutuan (Jadual 9) dan dibawah s. 40 KTN 'tanah' adalah kepunyaan Negeri dan sebagai pemilik tanah ia berhak membuat apa-apa keputusan atau mengambil apa-apa tindakan yang difikirkan wajar dan munasabah. Samada tindakan membatalkan sesuatu kelulusan itu wajar atau tidak merupakan isu yang berasingan dan tidak boleh menidakkan hak Kerajaan Negeri sebagai pemilik tanah.
>
> [31] Sekiranya setelah meluluskan permohonan mana-mana pihak Pihak Berkuasa Negeri hendaklah terus mengambil tindakan mengeluarkan geran hakmilik tanpa mempunyai kuasa untuk membatalkan kelulusan yang telah diberikan maka ini adalah bercanggah dengan s. 78(3) KTN.
>
> (penekanan ditambah)

[41] Mahkamah Rayuan baru-baru ini di dalam kes *Pentadbir Tanah Dan Daerah Petaling & Ors v. Bandar Utama City Corporation Sdn Bhd & Anor And Another Appeal* [2021] 5 CLJ 480; [2021] 4 MLJ 689 telah menunjukkan contoh bagaimana harapan yang sah itu boleh terpakai seperti berikut:

> [45] In order to succeed on the principle of legitimate expectation, it is incumbent on the applicants to show that the second and the sixth respondent gave them an undertaking. The undertaking must be clear and that is to close the temporary access road (Jalan Tanjung) once the applicants completed the construction of Jalan Hilir.

Adakah Terdapat Harapan Yang Sah Dalam Kes Ini?

[42] Keterangan yang dinyatakan dalam afidavit-afidavit menunjukkan bahawa pihak pemohon telah mendapat surat daripada Yang Amat Berhormat Menteri Besar Pahang yang menyatakan bahawa beliau tiada halangan dan menyokong permohonan pemohon. Walau bagaimanapun, pihak responden-responden menyatakan bahawa surat tersebut tidak membawa apa-apa kesan kepada permohonan pihak pemohon untuk mendapatkan lesen pendudukan sementara (TOL) tersebut. Ini adalah disebabkan Yang Amat Berhormat Menteri Besar Pahang tidak mempunyai kuasa untuk meluluskan lesen pendudukan sementara (TOL) tersebut secara perseorangan tetapi ia akan diluluskan oleh Pihak Berkuasa Negeri yang membawa maksud Majlis Mesyuarat Kerajaan Negeri di mana Yang Amat Berhormat Menteri Besar Pahang adalah pengerusi dalam mesyuarat tersebut. Para responden menyatakan bahawa surat tersebut masih tertakluk kepada kelulusan mengikut undang-undang dan keperluan untuk pemohon memenuhi dan mematuhi peruntukan undang-undang terutamanya Kanun Tanah Negara berkaitan permohonan lesen pendudukan sementara (TOL) tersebut. Oleh itu, pihak responden berhujah bahawa pemohon tidak boleh bergantung kepada surat tersebut. Ia tidak membawa apa-apa kesan kepada permohonan dan keputusan berkenaan permohonan tersebut.

[43] Namun begitu, dalam afidavit jawapan responden-responden mereka mengakui bahawa setelah surat tersebut ditunjukkan kepada responden pertama adalah didapati bahawa pertimbangan semula akan dibuat terhadap permohonan tersebut.

[44] Mahkamah perlu berhati-hati dan tidak terkeliru dengan bidang kuasa responden-responden untuk membuat keputusan terhadap permohonan pemohon. Ini adalah disebabkan undang-undang memberikan kuasa kepada para responden untuk membuat keputusan terhadap permohonan pemohon. Pemohon tidak sewajarnya meletakkan apa-apa tekanan sama ada secara substantif atau prosedur bagi menyebabkan responden-responden perlu membuat keputusan mengikut kehendak dan harapan pemohon. Ini adalah disebabkan harapan pemohon tidak boleh mengatasi kuasa yang diberikan kepada responden-responden untuk mempertimbangkan dan meluluskan permohonan pihak pemohon. Responden-responden sewajarnya membuat keputusan secara bebas tanpa dipengaruhi oleh harapan pihak pemohon.

[45] Berdasarkan kepada fakta-fakta di atas, pada hemat mahkamah menunjukkan bahawa tindakan yang dilakukan oleh para responden adalah merupakan suatu representasi yang diberikan oleh pihak yang mempunyai kuasa kepada pemohon. Berdasarkan kepada representasi tersebut yang dibuat secara rasmi dan kehadiran pemohon membentangkan kertas-kertas kerja tersebut serta pemohon juga telah diberikan lesen pendudukan sementara (TOL) tanah-tanah tersebut sebelum ini, mahkamah berpendapat

bahawa pemohon mempunyai harapan yang sah dalam kes ini. Ia adalah berbeza sekiranya pihak yang memberikan representasi tersebut tidak mempunyai kuasa atau terlibat di dalam keputusan terhadap permohonan pihak pemohon dan pemohon tidak pernah menduduki tanah TOL tersebut.

Alasan Keputusan Responden-responden

[46] Pemohon juga menyatakan bahawa penolakan permohonan pihak pemohon tidak diberikan sebab atau alasan penolakan tersebut. Peguam persekutuan berhujah bahawa tiada keperluan undang-undang untuk responden-responden memberikan alasan kepada keputusan yang dibuat oleh responden-responden.

[47] Tanggungjawab untuk pihak berkuasa memberikan alasan kepada keputusan yang dibuat adalah isu undang-undang yang berkembang. Secara khususnya tiada peruntukan undang-undang yang mewajibkan pihak berkuasa memberikan alasan kepada keputusan yang dibuat. Hal ini telah dinyatakan oleh Mahkamah Persekutan di dalam satu wacana yang menarik dalam kes *Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang) Sdn Bhd & Ors And Another Appeal* [2023] 2 CLJ 333; [2023] MLRAU 23; [2023] MLJU 98 seperti berikut:

> [222] Case-law on the subject of an obligation to give reasons within the context of the 'right to be heard' in this jurisdiction is scarce. The general legal stance adopted is that there is no duty to give reasons as there is no express statutory provision requiring it. However, the lack of an express statutory provision requiring the local authority to give reasons for its approval does not equate to a conclusion that there is no duty to give reasons at all; such a *prima facie* preclusion of this duty would reduce transparency in the decision-making process.

[48] Mahkamah Persekutuan juga telah memberikan garis panduan yang menarik berkenaan isu ini dalam kes *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265; [2018] 2 MLJ 590. Dalam kes *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd* (*supra*), ia melibatkan keputusan ketua pengarah kesatuan sekerja yang telah membuat keputusan untuk mendaftarkan satu kesatuan sekerja dalaman untuk para pekerja bukan eksekutif Malayan Banking Berhad. Mahkamah Persekutuan menyatakan seperti berikut:

> [86] It is also settled public law principle and principle of natural justice that a public decision making body is under a duty to give reasons for its decision. Indeed, a reasoned decisions can be an additional constituent of the concept of fairness (*Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 and *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193). The giving of reason is also one of the fundamentals of good administration.

[87] The absence of any provision in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give reason unless that very statute specifies that no reason needs be given. The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large.

[88] In a case where the decision is one that is straight forward and one that is not mired in circumstances that would invite further or deeper rationalisation, then, perhaps the need to give reason by the decision maker may not arise. The circumstances arising in the particular case may by implication, demand the imposition of the duty to give reasons. Lord Mustill in the House of Lord case of *Doody v. Secretary of State for the Home Department; and other appeals* [1993] 3 All ER 92 said:

> I accept without hesitation ... that the law does not at present recognise a general duty to give reasons for an administrative decision. **Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied**.
>
> (penekanan ditambah)

[89] In our view, in exercising his powers and/or discretion and making a decision under s. 12 of the TUA 1959 the DG must have a reason for that decision. It is not a fanciful decision and the discretion can never be exercised willy nilly. Being in that position, it is reasonable and appropriate to imply that he ought to have given reason/s for his decision. He did not do so, for he was under the erroneous belief (as stated in his affidavit in reply) that he has 'kuasa budi bicara yang mutlak'. He has not.

[49] Penelitian kepada keputusan-keputusan mahkamah di negara ini berkaitan dengan tanggungjawab untuk memberikan alasan kepada keputusan yang diberikan badan-badan pentadbiran telah menunjukkan bahawa ia bukannya dalam semua keadaan alasan perlu diberikan kepada keputusan yang dibuat. Ini dinyatakan misalnya dalam kes *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390; [1989] 1 MLJ 487 apabila Hakim Edgar Joseph JR setelah meneliti keputusan Mahkamah Agung India telah menyatakan bahawa tanggungjawab untuk memberikan alasan adalah bergantung kepada keadaan. Beliau juga menyatakan rasional mengapa setiap keputusan tidak semestinya berkewajipan untuk memberikan alasan dengan menyatakan seperti berikut:

> **Duty to give reasons**
>
> I must next consider another objection taken by the applicants. It was submitted that the law has developed to a stage where there is a general duty to provide reasons even when the relevant authority acts in a *quasi*-judicial matter. In support, the following passage in the judgment of Bhagwati J (as he then was) in *Siemens Engineering & Manufacturing Co v. Union of India* AIR 1976 SC 1785 was cited:

A

> It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every *quasi*-judicial order must be supported by reasons.
>
> The rule requiring reasons to be given in support of an order is, like the principle of *audi alteram partem*, a basic principle of natural justice which must inform every *quas*i-judicial process ...

B

With great respect to Bhagwati J, I consider that if the requirement for reasons is essential for every *quasi*-judicial order, then it would place administrative bodies in a very difficult position.

C

But, having said that, I accept that there are certain cases where reasons for decision should be given particularly when there is a right of appeal, since an appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate tribunal are entitled to know the reasons for the finding.

D

In *Breen v. Amalgamated Engineering Union* [1971] 2 KB 175, Lord Denning MR observed that where a person 'has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him, according as the case may demand'.

E

Though Lord Denning gave a minority judgment in that case the majority did not disagree with him on that point.

In the present case, it was argued, and I agree, that in a university environment, the exercise of reason and intellect are encouraged. The applicants are academics and should be told of the scope of free speech and interaction with students and why their defences

F

were rejected. The giving of reasons for decision in a situation such as this would also serve as a guide to other academics in the position of the applicants. Moreover, the applicants' livelihood was at stake. As was well put by Lord Denning in *Breen*'s case [1971] 2 KB 175 at p 191:

G

> If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149. But if he is a man whose property is at stake, or who is being deprived of his

H

> livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard.

In certain circumstances, which I have endeavoured to indicate, a reasoned decision can be an additional constituent of the concept of fairness. I am satisfied that having regard to all the

I

circumstances the present case was such a case. The applicants are also entitled to succeed on this ground since neither the disciplinary authority nor the university council gave any reasons for their decision.

[50] Dalam kes *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517; [2005] 5 MLJ 193, Mahkamah Rayuan telah menghubungkaitkan di antara tanggungjawab memberi keputusan dengan prinsip keadilan dengan menyatakan seperti berikut:

Having regard to the foregoing principles, we find that the failure of the first respondent to give reasons for his order of recognition and for adopting the recommendations of the DGTU and the DGIR violates the rules of procedural fairness. It is true that the DGIR and DGTU have a discretion to decide on the method of membership chock but misdiscretion is not unfettered and subject to the overriding principle of fairness. The first respondent, who adapted *in toto* the recommendations of the DGTU and DGIR gave no reasons to justify his decision either. Although the first respondent's discretion under s. 20(3) of the Act is wide, such a discretion is not unlimited.

The failure of the first respondent to give a reasoned decision when exercising his power under s. 9 of the Act is grossly inconsistent with the principles of fairness guaranteed under art 8 of the Federal Constitution. The decision of the first respondent is, therefore, fundamentally flawed on the basis that it had violated the principles of procedural fairness guaranteed by art 8 of the Federal Constitution and should be quashed. The effect of a flaw of such nature is aptly summarised by His Lordship Gopal Sri Ram, JCA in *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah* [1988] 3 MLJ 289 wherein at p 326 His Lordship stated as follows:

A public decision maker may not be procedurally compelled to furnish reasons for his decision. However, the absence of reason may warrant the drawing of what we call the '*Padfield* inference', that is to say, the inference that there are no good reasons for the impugned decision. (See *Padfield & Ors v. Minister of Agriculture, Fisheries and Food & Ors* [1968] AC 997). In other words:

... courts will take into account any reasons which the body may give for its decisions. If it gives no reasons – in a case when it may reasonably be expected to do so, the courts will infer that it has no good reason for reaching its conclusion and act accordingly.

[51] Sementara itu, jika diteliti kedudukan di bawah undang-undang lazim (common law) berkenaan dengan tanggungjawab memberikan alasan telah dinyatakan oleh Mahkamah Agung di United Kingdom dalam kes *Regina (CPRE Kent) v. Dover District Council* [2018] 1 WLR 108 seperti berikut:

51 Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no

express duty is imposed (see *R v. Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531; *R v. Higher Education Funding Council, Ex p Institute of Dental Surgery* [1994] 1 WLR 242, 263A-D; *De Smith's Judicial Review* 7th ed (2013), para 7-099). Doody concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:

> To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view": p 565, per Lord Mustill.

It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review.

[52] Dalam kes *Oakley v. South Cambridgeshire District Council* [2017] 1 WLR 3765 yang melibatkan keputusan pihak berkuasa tempatan untuk membenarkan permohonan pembinaan yang bercanggah dengan syor pegawai perancang bagi membina padang bola sepak yang boleh menampung 3,000 orang penonton bersama-sama dengan laman rekreasi masyarakat di Green Belt Land di Sawston, Cambridgeshire. Mahkamah Rayuan di United Kingdom memutuskan bahawa adalah menjadi tanggungjawab pihak berkuasa tempatan untuk memberikan alasan keputusan tersebut. Ini adalah disebabkan keputusan tersebut berkaitan dengan penduduk tempatan. Mahkamah Rayuan menyatakan seperti berikut:

> 59 In a general sense this may be considered an aspect of the duty of fairness which in this context requires that decisions are transparent. The right for affected third parties to be treated fairly arises because of the strong and continuing interest they have in the character of the environment in which they live. Even if the decision to allow a development does not affect any property or financial interest, it may damage other non-pecuniary interests which affected parties may value

equally highly. In my judgment, these are powerful reasons for imposing a duty to give reasons, at least if the reasoning process is not otherwise sufficiently transparent.

60 The decision in this case involved a development on the Green Belt and was also in breach of the development plan. Public policy requires strong countervailing benefits before such a development can be allowed, and affected members of the public should be told why the committee considers the development to be justified notwithstanding its adverse effect on the countryside. In my judgment these considerations demand that reasons should be given. Even if there are some planning decisions which do not attract the duty to give reasons, there is in my judgment an overwhelming case for imposing the duty here.

61 That conclusion is in my judgment reinforced where the committee departs from the officer's recommendation. The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required. As I have said, I would not impose the duty to give reasons on the grounds that the committee's decision appears to be aberrant within the principle in *Ex p Cunningham* [1992] I CR 816, but the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty.

[53] Berdasarkan kepada autoriti-autoriti di atas, prinsip yang boleh dipelajari berkenaan dengan tanggungjawab untuk memberikan alasan keputusan oleh badan pentadbiran adalah seperti berikut:

(i) tiada tanggungjawab di sisi undang-undang yang meletakkan tanggungjawab untuk badan pentadbiran memberikan alasan kepada keputusan melainkan dinyatakan secara tersurat di dalam undang-undang bertulis;

(ii) di bawah undang-undang lazim (common law) tiada tanggungjawab untuk memberikan alasan keputusan oleh badan pentadbiran;

(iii) sekiranya keputusan-keputusan tersebut melibatkan kepentingan awam adalah wajar untuk alasan keputusan tersebut diberikan; dan

(iv) sekiranya pihak yang ingin mendapatkan keputusan tersebut mempunyai harapan yang sah atau bagi memastikan prinsip keadilan terhadap individu tersebut dapat dicapai maka alasan keputusan tersebut wajar diberikan.

Dalam erti kata lain, tanggungjawab untuk memberikan alasan kepada keputusan yang diberikan oleh badan pentadbiran berkait rapat dengan kepentingan keadilan kepada pihak yang mempunyai kesan kepada keputusan tersebut.

[54] Mahkamah berpendapat bahawa bagi menggalakkan ketelusan di dalam keputusan badan pentadbiran adalah suatu tindakan yang baik serta dialu-alukan untuk alasan diberikan kepada keputusan yang dibuat. Ini adalah bagi memberikan gambaran yang jelas mengapakah suatu permohonan atau keputusan permohonan orang awam ditolak bagi mengelakkan sebarang tomahan salah guna kuasa. Di samping, itu ia juga akan memberi peluang kepada mahkamah untuk mengetahui sandaran kepada keputusan tersebut sekiranya terdapat prosiding semakan kehakiman.

[55] Ia juga adalah salah satu mekanisme bagi meningkat tata kelola pentadbiran Kerajaan yang lebih bertanggungjawab serta membantu sikap kebertanggungjawaban pihak berkuasa pentadbiran dalam keputusan yang diberikan.

[56] Pada masa yang sama, mahkamah juga perlu mengambil perhatian bahawa sekiranya semua keputusan yang dibuat oleh badan pentadbiran perlu diberikan alasan ia akan menimbulkan kesukaran kepada pihak berkuasa pentadbiran. Mahkamah berpendapat itu bukannya hasrat yang dikehendaki oleh undang-undang. Pada masa yang sama, mahkamah juga perlu mengambil kira bahawa terdapat di antara keputusan-keputusan badan pentadbiran tersebut yang melibatkan isu-isu keselamatan yang tidak boleh didedahkan kepada orang awam dan ia bercanggah dengan kepentingan awam.

[57] Oleh itu, persoalan sama ada alasan keputusan perlu diberikan oleh badan pentadbiran adalah bergantung kepada fakta dalam sesuatu kes. Jika keputusan tersebut melibatkan kepentingan awam, alasan keputusan tersebut adalah wajar diberikan. Dalam erti kata lain, faktor-faktor tersebut perlu diambil kira dalam memutuskan sama ada alasan keputusan perlu diberikan atau sebaliknya.

[58] Namun demikian, dalam kes ini seperti yang dinyatakan di atas, mahkamah berpuas hati bahawa pemohon mempunyai harapan yang sah yang menyebabkan alasan kepada penolakan permohonan tersebut adalah satu yang wajar diberikan oleh pihak responden-responden.

Kesimpulan

[59] Adalah menjadi harapan orang awam yang berurusan dengan badan pentadbiran memperolehi keputusan terhadap apa-apa permohonan yang dikemukakan. Badan pentadbiran tersebut tidak boleh berlindung di sebalik alasan bahawa undang-undang tidak mewajibkan tanggungjawab untuk memberikan alasan kepada keputusan yang dibuat. Sebaliknya, badan pentadbiran harus mempunyai ketelusan di dalam memaklumkan keputusan yang dibuat beserta dengan alasan tertakluk kepada fakta dan jenis keputusan yang dibuat.

[60] Apa yang penting ialah keputusan tersebut dibuat dengan tidak mencabuli keadilan dan kebebasan yang dijamin di bawah Perlembagaan Persekutuan dan undang-undang pentadbiran.

[61] Sesungguhnya badan pentadbiran sewajarnya mementingkan keadilan dalam membuat keputusan. Keputusan tersebut juga haruslah sejajar dengan prinsip undang-undang pertadbiran dan tidak bercanggah dengan Perlembagaan Persekutuan serta undang-undang bertulis yang lain.

[62] Akhirnya, mahkamah memutuskan seperti berikut:

(i) permohonan semakan kehakiman oleh pemohon dibenarkan;

(ii) perintah *certiorari* membatalkan keputusan responden pertama bertarikh 17 Januari 2022 menolak permohonan pemohon untuk lesen pendudukan sementara (TOL) yang mempunyai no. rujukan: PTR1/03/T/0174/11, PTR1/03/T/0172/11 dan PTR1/03/T/0100/13 diberikan; dan

(ii) perintah untuk permohonan lesen pendudukan sementara (TOL) pemohon berkenaan hartanah yang mempunyai No. Rujukan: PTR1/03/T/0174/11, PTR1/03/T/0172/11 dan PTR1/03/T/0100/13 dipertimbangkan semula oleh responden pertama, responden kedua dan/atau responden ketiga.